

No. 85535-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals No. 39171-6-II)

LEO MACIAS AND PATRICIA MACIAS,

Plaintiffs-Appellants,

v.

SABERHAGEN HOLDINGS, INC., et. al.,

Defendants-Respondents.

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**BRIEF OF THE COALITION FOR LITIGATION JUSTICE, INC.,
NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER
OF COMMERCE OF THE UNITED STATES OF AMERICA,
PROPERTY CASUALTY INSURERS ASSOCIATION OF
AMERICA, AMERICAN INSURANCE ASSOCIATION, AND
AMERICAN CHEMISTRY COUNCIL AS *AMICI CURIAE* IN
SUPPORT OF DEFENDANTS-RESPONDENTS**

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STATEMENT OF THE QUESTION PRESENTED

Whether a respirator manufacturer owes a duty to warn end users of the dangers of exposure to asbestos-containing products manufactured, sold, or supplied by third parties when its respirators are cleaned.¹

STATEMENT OF INTEREST

As organizations that represent companies doing business in Washington and their insurers, *amici* have a substantial interest in ensuring that the state's tort system is fair, follows traditional tort law rules, and reflects sound public policy. The appellate court's decision below is consistent with these principles and should be affirmed.

STATEMENT OF FACTS

Amici adopt Defendants-Respondents' Statement of Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Asbestos litigation is the "longest-running mass tort" in U.S. history. Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 511 (2008). Lawyers who bring asbestos cases have perpetuated the litigation for forty years by seeking out new defendants or raising new theories of liability. See Mark Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501 (2009).

¹ This case does not involve a claim that a wearer was exposed to asbestos caused by a design defect or manufacturing flaw in a respirator.

An emerging theory promoted by some plaintiffs' counsel – which this Court squarely rejected in *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008), and *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008) – is that makers of products, such as pumps or valves, should be held liable for harms allegedly caused by asbestos-containing replacement parts manufactured or sold by third parties (*i.e.*, replacement internal gaskets or packing or replacement external flange gaskets) or asbestos-containing external thermal insulation manufactured and sold by third parties and attached post-sale (*e.g.*, by the U.S. Navy). As this Court recognized, whether couched in terms of strict liability or negligence, it is black-letter law that manufacturers are not liable for harms caused by others' products.

This case addresses the identical legal issue in an area fraught with significant adverse public policy consequences. Plaintiffs essentially seek to impose a duty on manufacturers of personal protective equipment, here, respirators, to warn about hazards in products made or sold by others. *See* James Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 Sw. U. L. Rev. 595 (2008) (authored by co-reporter for the Restatement Third, Torts: Products Liability). It is easy to see what is suddenly driving this novel theory: most major manufacturers of asbestos-

containing products have filed bankruptcy. As a substitute, Plaintiffs seek to impose liability on solvent manufacturers like Defendants for harms caused by products they never made, sold, installed, or profited from. This Court should reject Plaintiffs' invitation to limit or abandon its well-reasoned rulings in *Simonetta* and *Braaten* by creating a broad new duty rule requiring manufacturers of protective equipment to warn about risks of the products of others from which their own products provide protection.

Furthermore, Plaintiffs' theory represents unsound public policy. The decision would place manufacturers of safety equipment at risk of considerable liability. Already, respirator manufacturers have faced a flood of asbestos and silica claims. They are often dragged into such litigation as solvent bystanders as an ever-growing number of companies that actually manufactured products with asbestos declare bankruptcy.

Civil defendants in other types of cases would also be adversely affected, as the broad new duty rule sought here presumably would not be limited to asbestos litigation but could require manufacturers of protective equipment to warn about all conceivable dangers relating to hazards in others' products that might be used in conjunction with their own. It is one thing, for example, to require manufacturers of rubber gloves to warn users of the potential for latex allergies associated with their own

products; it is quite another to require rubber glove makers to warn of the particular dangers of the numerous chemicals and cleansers made by others that the gloves provide a barrier against. It is particularly important to maintain a strong domestic respirator industry to promote public health.

For these reasons, this Court should affirm the court below.

ARGUMENT

I. SETTLED LEGAL PRINCIPLES REQUIRE DISMISSAL

In a pair of two well-reasoned decisions, this Court held that manufacturers have no duty to warn about asbestos-related hazards in products made by others regardless of manufacturer's knowledge, or the level of foreseeability, that the products would be used together. *See Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008); *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008).² Lower

² Courts in other jurisdictions have also soundly rejected a duty to warn with respect to risks in products made by third parties. *See Taylor v. Elliott Turbomachinery Co., Inc.*, 171 Cal. App. 4th 564 (1st Dist. 2009); *Hall v. Warren Pumps, LLC*, 2010 WL 528489 (Cal. App. 2d Dist. Feb. 16, 2010), *review granted* (May 12, 2010); *Merrill v. Leslie Controls, Inc.*, 179 Cal. App. 4th 262 (2d Dist. 2009), *review granted and opinion superseded*, 224 P.3d 919 (Cal. 2010); *Walton v. William Powell Co.*, 183 Cal. App. 4th 1470 (2d Dist.), *review granted and opinion superseded*, 232 P.3d 1201 (Cal. 2010); *Woodard v. Crane Co.*, 2011 WL 3759923 (Cal. App. 2d Dist. Aug 25, 2011); *Petros v. 3M Co.*, 2009 WL 6390885 (Cal. Super. Ct. Sept. 30, 2009); *In re Asbestos Litig.*, 2011 WL 2462569 (Del. Super. June 07, 2011); *In re Taska*, 2011 WL 379327 (Del. Super. Jan. 19, 2011); *Schaffner v. Aesys Tech., LLC.*, 2010 WL 605275 (Pa. Super. Jan. 21, 2010); *Kolar v. Buffalo Pumps, Inc.*, 2010 WL 5312168, 15 Pa. D. & C. 5th 38 (Pa. Com. Pl. Aug. 2, 2010); *Rumery v. Garlock Sealing Technologies, Inc.*, 2009 WL 1747857 (Me. Super. Ct. Cumberland County Apr. 24, 2009); *Nelson v. 3M Co.*, 2011 WL 3983257 (Trial Order) (Minn. Dist. Ct. Aug. 16, 2011); *Ford Motor Co. v. Wood*, 703 A.2d 1315 (Md. Ct. Spec. App.), *cert. denied*, 709 A.2d 139 (Md. 1998), *abrogated* (Footnote continued on next page)

courts have faithfully followed these rulings,³ which preclude liability in the case now before this Court.

In *Simonetta*, the defendant manufactured evaporators, devices used in naval ships that convert seawater to freshwater. 165 Wn.2d at 345, 197 P.3d at 129. Joseph Simonetta, the plaintiff, served on the ship as a machinist, and his responsibilities included conducting routine maintenance on the evaporators. *Id.* at 346, 197 P.3d at 130. During his work, Mr. Simonetta removed asbestos insulation that encased the evaporators. Mr. Simonetta alleged that this exposure to the asbestos, while “‘pry[ing] or hack[ing] away’ the asbestos insulation with a hammer,” contributed to his development of lung cancer. *Id.* While it was expected that the evaporator would be used in conjunction with asbestos, the asbestos insulation was not manufactured by the evaporator maker, but

on other grounds, John Crane, Inc. v. Scribner 800 A.2d 727 (Md. 2002); *Lindstrom v. A-C Prods. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005); *Niemann v McDonnell Douglas Corp.*, 721 F. Supp. 1019 (S.D. Ill. 1989); *but see O’Neil v. Crane Co.*, 177 Cal. App. 4th 1019 (2d Dist.), *review granted and opinion superseded*, 223 P.3d 1 (Cal. 2009); *see also Paul Riehle et al., Product Liability for Third Party Replacement or Connected Parts: Changing Tides From the West*, 44 U.S.F. L. Rev 33 (2009).

³ *See, e.g., Wangen v. A.W. Chesterston Co.*, 2011 WL 3443962 (Wash. App. Div. 1, Aug. 8, 2011) (dismissing claims against manufacturer related to exposure to asbestos replacement gaskets and packing used in its pumps); *Yankee v. APV N. Am., Inc.*, 2011 WL 2775982 (Wash. App. Div. 1 July 18, 2011) (dismissing claim against defendant related to replacement asbestos-containing gaskets and packing used on its carbon mixers at an aluminum mill); *Anderson v. Asbestos Corp., Ltd.*, 151 Wash. App. 1005, 2009 WL 2032332 (Wash. Ct. App. July 13, 2009) (dismissing claim against Caterpillar related to exposure to asbestos insulation used with engines it manufactured).

was provided by another company and then installed on the evaporator by the navy or another entity. *Id.*

The Court considered a similar situation in *Braaten*. There, the defendants manufactured pumps and valves that were sold to the Navy and used aboard ships. *See* 165 Wn.2d at 381, 198 P.3d at 496. Vernon Braaten, a pipefitter, maintained equipment on Navy ships. *Id.* Mr. Braaten alleged that his exposure during the process of scraping or chipping off the asbestos packing from the exterior of pumps and valves led to his diagnosis of mesothelioma. *Id.* None of the defendants manufactured, sold, or applied asbestos to its products, but some of the products were originally shipped with asbestos-containing packing or gaskets manufactured by others. *See id.* at 380, 198 P.3d at 495.

These cases are factually similar to, and legally indistinguishable from, the case before this Court – in *Simonetta* and *Braaten* and here, plaintiffs' source of asbestos exposure came entirely from products made or sold by third parties. *Simonetta* and *Braaten* provide four general principles that are equally applicable in the context of the case before this Court – claims against respirator manufacturers stemming from asbestos exposure during maintenance on the product when the asbestos was made by others.

**A. Black Letter Law Precludes Failure to Warn
Liability for those Outside the Chain of Distribution**

At the core of these rulings is the Court's rejection of an invitation to deviate from the black-letter rule for the common law duty to disclose, set forth in the Restatement (Second) of Torts § 388 (1965), that only manufacturers, sellers, and suppliers that are in the chain of distribution of the product that allegedly caused the injury have a duty to warn of the dangers of that product. *Id.* at 350-53, 198 P.3d at 131-34. After "a careful review of case law interpreting failure to warn cases," this Court found "little to no support under our case law for extending the duty to warn to another manufacturer's product." *Simonetta*, 165 Wn.2d at 350, 353, 198 P.3d at 132, 33.

In *Simonetta*, the Court recognized that the "unreasonably dangerous product" that caused the plaintiff's asbestos-related illness was "the asbestos insulation," not the defendant's evaporator. *Id.* at 358, 198 P.3d at 136. Thus, because the defendant "was not in the chain of distribution of the dangerous product" liability could not be imposed. *Id.* at 363, 198 P.3d at 138.

Here, the product that allegedly caused the Plaintiff's illness, as in *Braaten* and *Simonetta*, was asbestos dust originating from shipyard work. *Macias v. Mine Safety Appliances Co.*, 158 Wash. App. 931, 936, 244

P.3d 978, 980 (2010). The defendants, respirator manufacturers, did not make, sell, or distribute the asbestos-containing products used at the shipyard. Since the defendants were not in the chain of distribution of the products that led to Mr. Macias's exposure to asbestos, application of black letter law, as recognized by this Court, precludes his claims.

B. The Public Policy Basis for Imposing Liability for Failure to Warn is Absent When the Defendant Did Not Manufacture or Sell the Hazardous Product

The Court reached this conclusion because it recognized that the public policy basis underlying strict liability is absent when the defendant is not in the chain of distribution for the hazardous product. Strict liability is based on the rationale that imposition of liability is justified on “the defendant who, by manufacturing, selling, or marketing a product, is in the best position to know of the dangerous aspects of the product and to translate that knowledge into a cost of production against which liability insurance can be obtained.” *Simonetta*, 165 Wn.2d at 355, 198 P.3d at 134. As further explained in the Restatement (Second) of Torts:

On whatever theory, the justification for strict liability has been said to be that *the seller*, by marketing *his product* for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon *the seller*, that reputable sellers will stand behind *their goods*; that public policy demands that the burden of accidental injuries

caused by products intended for consumption be placed upon *those who market them*, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and *the proper persons to afford it are those who market the products*.

Restatement (Second) of Torts § 402A cmt. c (1965) (emphasis added).

This foundation is stripped away when considering whether manufacturers must warn of the hazards of exposure to asbestos-containing products that they did not make or sell. These manufacturers do not have a “special responsibility” to the public for the products of others; they have no duty to “stand behind” the goods of another; and they are not in a position to incorporate the costs of liability insurance into their prices when the liability is associated with products they did not make or sell. *Braaten*, 165 Wn.2d at 392-93, 198 P.3d at 502.

C. Knowledge or Foreseeability That an Otherwise Safe Product Will be Used in Conjunction With Asbestos Does Not Create a Duty to Warn

The fact that a manufacturer has knowledge that its own product will be used in conjunction with another product or component that contains asbestos, or that it is foreseeable that its product will be used in the presence of asbestos, does not give rise to a duty to warn. As this Court recognized, “foreseeability has no bearing on the question of

adequacy of warnings in these circumstances.” *Simonetta*, 165 Wn.2d at 358, 198 P.3d at 136.

In *Simonetta*, the plaintiff claimed that since evaporators “necessarily involved use of asbestos insulation,” the manufacturer had a duty to address “the manner in which to use the evaporator safely, i.e., warning of the foreseeable dangers of respirable asbestos.” *Id.* at 357, 198 P.3d at 135. The Court of Appeals accepted this theory, finding that “the danger of asbestos exposure was inherent in the use of the evaporator because the evaporator was built with the knowledge that insulation was required for proper operation and that workers would need to invade the insulation for maintenance.” *Id.* at 350, 198 P.3d at 132. This Court, however, reversed. It recognized that strict liability is not based on foreseeability, but on whether the manufacturer sold an unreasonably dangerous product. *Id.* at 362, 198 P.3d at 138. Nor did foreseeability support a negligence claim, since a manufacturer has no duty to warn of dangers associated with products that are not its own. *See id.*

Similarly, in *Braaten*, the plaintiff argued that the defendants had a duty to warn of the dangers of asbestos because it was foreseeable that asbestos-containing packing and gaskets would be applied to their valves and pumps, and, indeed, that some of the defendants’ products originally contained asbestos-containing packing and gaskets made by others.

Braaten, 165 Wn.2d at 380-81, 198 P.3d at 495-96. Citing *Simonetta*, the Court recognized that “whether the manufacturers knew replacement parts would or might contain asbestos makes no difference because such knowledge does not matter. . . .” *Id.* at 391, 198 P.3d at 501.

As in *Simonetta* and *Braaten*, this Court should reject Mr. Macias’s claim that the defendants had a duty to warn of the dangers of asbestos simply because they knew that their products, respirators, were likely to be used in the presence of asbestos. In fact, plaintiffs in *Simonetta* and *Braaten* had a stronger argument since, in both those cases, it was alleged that the defendants’ products were necessarily used in conjunction with asbestos. By way of contrast, here, “[d]ifferent filter cartridges could be inserted into the respirators to protect the workers against specific contaminants, including welding fumes, paint fumes, asbestos particles, and dust.” *Macias*, 158 Wash. App. at 936, 244 P.3d at 980.

“The [defendant’s own] product must, in some sense of the word, ‘create’ the risk.” James Henderson, Jr. & Aaron Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 284 (1990). Otherwise, as Professor Henderson explained, if a manufacturer is required to warn about someone else’s products, then the manufacturer “is being required to perform a watchdog function in order to rescue product users from risks it had no active part in

creating and over which it cannot exert meaningful control.” Henderson, 37 Sw. U. L. Rev. at 601.

D. Manufacturers Cannot be Expected to Become Experts on, and Relay Warnings for, the Myriad of Products That May be Used With Their Own

To require manufacturers to warn of the dangers of products other than their own, simply because their own products are likely to be used in conjunction with others that pose a risk of injury, would place a substantial burden on manufacturers, one that they are not in the best position to bear.

For instance, in *Braaten*, where the Navy had approved more than sixty types of packing, *id.* at 502, the Court understood that:

A manufacturer’s duty to warn is restricted to warnings based on the characteristics of the manufacturer’s own products[.] The law generally does not require a manufacturer to study and analyze the products of others and warn users of the risks of those products. Courts reason, among other things, that in general a manufacturer has no obligation to become expert in another manufacturer’s product and that the policy underpinnings for strict liability . . . do not apply when a manufacturer has not placed the product in the stream of commerce.

Id. at 385-86, 198 P.2d at 498 (internal citations, quotations, and alterations omitted). The Court concluded that manufacturers “cannot be charged with testing and warning against any of a myriad of replacement parts supplied by any number of manufacturers.” *Braaten*, 165 Wn.2d at

392-93, 198 P.2d at 502 (quoting *Ford Motor Co. v. Wood*, 703 A.2d 1315 (Md. Ct. Spec. App.), *cert. denied*, 709 A.2d 139 (Md. 1998), *abrogated on other grounds*, *John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002)). It is the manufacturer of the product that caused the injury that is in the “best position to know of the dangerous aspects of the product,” *Simonetta*, 165 Wn.2d at 355, 198 P.3d at 134, and communicate that risk.

This reasoning for not imposing a duty to warn is particularly compelling in the case of manufacturers of safety equipment that protect against a wide variety of toxic substances. For example, recognizing an obligation to warn in this case could require:

- A manufacturer of rubber, surgical, or work gloves to warn of the dangers of numerous chemicals or substances for which the gloves may be used as protection;
- A manufacturer of helmets to warn of the risk of objects that could potentially strike a worker on a construction site; or
- A manufacturer of protective eyewear to warn of the dangers of various substances that the eyewear would protect against, but could end up on the users’ fingers and then wiped into the user’s eyes after removing the glasses.

Manufacturers of protective equipment should not be conscripted as insurers of other manufacturers’ products.

II. A DUTY REQUIREMENT HERE WOULD WORSEN THE ASBESTOS LITIGATION

“For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits.” *In re Combustion Eng’g, Inc.*,

391 F.3d 190, 200 (3d Cir. 2005); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (describing the asbestos litigation as a “crisis.”). Now in its fourth decade, the litigation has been sustained by a relentless search for new defendants and new theories of liability. The case before this Court is another instance of a creative attempt to evolve the litigation once again, and without any legal foundation.

In its earlier years, the asbestos litigation focused on companies that manufactured asbestos-containing products, often called “traditional defendants,” such as Johns Manville. Most of these primary historical manufacturers of asbestos are now bankrupt. By 2006, asbestos-related liabilities had forced over eighty-five companies into bankruptcy. *See* Martha Neil, *Backing Away from the Abyss*, A.B.A. J., Sept. 2006, at 26, 29, *available at* http://www.abajournal.com/magazine/article/backing_away_from_the_abyss/. As of today, asbestos litigation has forced at least ninety-six companies into bankruptcy, *see* Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (Rand Corp. 2010), *available at* http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf, with devastating impacts on defendants companies’ employees, retirees, shareholders, and surrounding communities. *See* Joseph Stiglitz et al., *The*

Impact of Asbestos Liabilities on Workers in Bankrupt Firms, 12 J. Bankr. L. & Prac. 51 (2003).

As a result of the large number of bankruptcies, “the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.” Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract available at* 2001 WLNR 1993314. One former plaintiffs’ attorney described the litigation as an “endless search for a solvent bystander.” ‘*Medical Monitoring and Asbestos Litigation*’—A Discussion with Richard Scruggs and Victor Schwartz, 17:3 Mealey’s Litig. Rep: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).

The dockets reflect that the litigation has moved far beyond the era in which manufacturers, producers, suppliers and distributors of friable asbestos-containing products or raw asbestos were the defendants. The range of defendants has expanded beyond those responsible for asbestos-containing products, producing exponential growth in the dimensions of asbestos litigation and compounding the burden on the courts.

The Towers Watson consulting firm has identified more than 10,000 companies, including subsidiaries, named as asbestos defendants. See Towers Watson, *A Synthesis of Asbestos Disclosures From Form 10-Ks - Insights*, Apr. 2010, at 1, *available at* http://www.towerswatson.com/assets/pdf/1492/Asbestos_Disclosures_Insights_4-15-10.pdf. At least one

company in nearly every U.S. industry is involved in the litigation. *See* American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* 5 (Aug. 2007), available at www.actuary.org/pdf/casualty/asbestos_aug07.pdf. Nontraditional defendants now account for more than half of asbestos expenditures. *See* Stephen Carroll et al., *Asbestos Litigation* 94 (RAND Corp. 2005), available at http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf.

Included in the ever-expanding net of potential defendants are respirator manufacturers. Unlike most other attenuated defendants who have been pulled into these cases, however, respirator manufacturers designed protective equipment to guard against the harmful effects of prolonged exposure to such airborne contaminants.

Yet, in spite of this distinction, which is significant from both a legal and public policy standpoint, respirator manufacturers are increasingly targeted in litigation. That this increase in claims against respirator manufacturers occurred in the absence of a reported mass failure of a product is astonishing. In fact, in the silica context, a federal judge who reviewed over 10,000 claims ruled that virtually all were "manufactured for money." *In re Silica Prods. Liab. Litig.*, 398 F. Supp.2d 563, 635 (S.D. Tex. 2005); *see also* Stephen Carroll et al., *The*

Abuse of Medical Diagnostic Practices in Mass Litigation: The Case of Silica (RAND Corp. 2009), available at http://www.rand.org/pubs/technical_reports/2009/RAND_TR774.pdf. There are few reported verdicts against respirator manufacturers. One such rare case led the Mississippi Supreme Court to grant judgment notwithstanding the verdict due to the lack of evidence that the plaintiffs wore masks while exposed to asbestos, let alone the defendant's masks, or that the plaintiff relied on any representations, labeling, or warnings provided by the company. See *3M Co. v. Johnson*, 895 So. 2d 151, 154-57, 164-65 (Miss. 2005). Even where settled for small amounts that are no greater than litigation costs, the cumulative effect of these lawsuits can damage the viability of respirator manufacturers.⁴ It is in the context of this litigation, in which plaintiffs' lawyers are constantly attempting to expand the pool of defendants in asbestos litigation, that this case arrives before this Court.

It is also important to note that asbestos claimants are able to obtain recoveries from trusts created to pay claims relating to the many companies that have declared bankruptcy. Over 60 trusts have been established or proposed to collectively form a \$30-plus billion privately

⁴ For instance, as concerns regarding the flu pandemic rose, United States respirator manufacturers warned that they had spent ninety percent of net income from respirator sales on litigation costs in one year. See Press Release, Coalition for Breathing (Footnote continued on next page)

funded asbestos personal injury compensation system that operates parallel to, but wholly independent of, the civil tort system. See Lloyd Dixon et al., *An Overview of Trust Structure and Activity*, *supra*, at 25. “Trust outlays have grown rapidly since 2005.” Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* xi (Rand Corp. 2011), at <http://www.rand.org/pubs/monographs/MG1104.html>. “For the first time ever, trust recoveries may fully compensate asbestos victims.” Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 Mealey’s Asbestos Bankr. Rep. 1 (Nov. 2006), at <http://www.bateswhite.com/media/pnc/7/media.287.pdf>.⁵

III. IMPOSING UNDUE LIABILITY ON RESPIRATOR MANUFACTURERS MAY ADVERSELY IMPACT PUBLIC HEALTH AND SAFETY

Claims against respirator manufacturers are not only damaging to the companies, but threaten to have a broader adverse effect on the public health and safety. Such lawsuits target the very companies that

Safety, *Can the U.S. Afford a Shortage of Respirator Masks to Fight Flu Pandemic?*, available at http://www.breathingsafety.interactive.biz/press/release/2006/09_19.htm.

⁵ For example, it is estimated that mesothelioma plaintiffs in Alameda County (Oakland) will receive an average \$1.2 million from active and emerging asbestos bankruptcy trusts, see Charles E. Bates et al., *The Naming Game*, 24:15 Mealey’s Litig. Rep.: Asbestos 1 (Sept. 2, 2009), available at <http://www.bateswhite.com/media/pnc/9/media.229.pdf>, and could receive as much as \$1.6 million. See Charles E. Bates et al., *The Claiming Game*, 25:1 Mealey’s Litig. Rep.: Asbestos 27 (Feb. 3, 2010), available at <http://www.bateswhite.com/media/pnc/2/media.2.pdf>.

manufacture equipment to safeguard workers from the hazardous products at issue. *See generally* Victor Schwartz et al., *Respirators to the Rescue: Why Tort Law Should Encourage, Not Deter, the Manufacture of Products that Make Us Safer*, 33 Am. J. Trial Advoc. 13 (2010).

The financial impact of such suits, even if ultimately dropped or settled for small amounts, provides a strong disincentive for respirator manufacturers to continue producing these safety devices for sale in the United States or for new companies to enter the respirator market. If the evolution of asbestos and silica mass tort litigation provides any guide, mounting liabilities could force respirator manufacturers to exit the market. These results, at the very least, would reduce the availability and affordability of respirators. Should their supply fail to keep pace with demand, industrial workers and the public would be exposed to considerable, and entirely unnecessary, risk.

Such negative effects are heightened in times of emergency or crisis. An integral part of the United States emergency planners' and first responders' strategy in the case of a flu pandemic is the use of respirators to prevent its spread; a strategy which, depending on the severity of the outbreak, may fail due to litigation costs depleting the capital resources among the major domestic respirator manufacturers. *See generally* Bevan Schneck, *A New Pandemic Fear: A Shortage of Surgical Masks*, Time,

May 19, 2009, available at <http://www.time.com/time/health/article/0,8599,1899526,00.html> (reporting that the CDC Strategic National Stockpile contains one mask for every three Americans compared with 2.5 and 6 per resident in Australia and Great Britain, respectively); Kelly Pyrek, *U.S. Pandemic Could Severely Strain Face Mask, Other PPE Supply Pipeline*, Infection Control Today, Oct. 4, 2008, available at <http://www.infectioncontrolday.com/articles/pandemic-and-face-mask-shortage.html> (reporting that France has purchased hundreds of millions of masks for its citizens). Most respirator production has moved outside the United States, with nine out of ten masks (respirators and the less sturdy surgical masks) manufactured in China and Mexico. See Schneck, *supra*. This reliance on foreign manufacturers has led some to question whether sufficient respirators would be available to Americans in an emergency situation because foreign manufacturers are likely to divert supplies to their home countries if they are needed.

CONCLUSION

For these reasons, *amici* urge the Court to affirm the ruling below.

Respectfully submitted,


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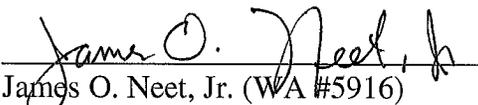
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